

3435. Misbranding of *Tates Antiseptic Germicide*. U. S. v. 10 Cases * * *.
(F. D. C. No. 29101. Sample No. 35866-K.)

LIBEL FILED: May 9, 1950, District of Hawaii.

ALLEGED SHIPMENT: On or about January 4, 1950, by Tate Chemical Co., Inc., San Jose, Calif.

PRODUCT: 10 cases, each containing 12 6-ounce bottles, of *Tates Antiseptic Germicide* at Honolulu, T. H. Analysis showed that the product consisted essentially of epsom salt, zinc sulfate, boric acid, a salicylate, water, and acetone.

NATURE OF CHARGE: Misbranding, Section 502 (a), the following statements in the labeling of the article, namely, in the leaflets wrapped around each bottle, were false and misleading since the article was not an adequate and effective treatment for the conditions stated and implied: "This product has been found exceptionally efficacious in treatment of some of the most contagious skin troubles and other ills. Among these we list those we claim this antiseptic-germicide will rapidly and almost always permanently relieve: * * * barber's itch, blackheads, blood poison, burns, scalds, erysipelas, eczema, * * * hives, itching scalp, itching piles, * * * old sores * * * acne, ring worm, shingles, salt rheum, seven-year itch, doby itch, skin scale * * *. It also has been used successfully in combating the distress of foul smelling feet by remedying the cause. Burns and Scalds These are naturally not caused by germs. Even the chemist that perfected this preparation is unable to explain how it acts in relieving the pain caused by burns, scalds * * *. If applied immediately, it will prevent blistering * * *. So many human ailments are declared to be due to germs, that the discovery of a formula that kills germs with such remarkable thoroughness, means a great deal to humanity. The fact that germs or bacteria are regarded as the cause of almost every known contagious disease or infection, makes it particularly gratifying that this antiseptic-germicide was created after many years of intensive study, experiment and tests by Dr. Tate."

DISPOSITION: April 3, 1951. Tate Chemical Co., Inc., having admitted the allegations of the libel and consented to the entry of a decree, judgment of condemnation was entered and the court ordered that the product be destroyed.

3436. Misbranding of Vrilium Catalytic Barium Chloride tube. U. S. v. Vrilium Products Co., George C. Erickson, and Robert T. Nelson, Jr. Pleas of not guilty. Tried to the court and jury. Verdict of guilty. Fines of \$1,000 against each defendant, plus costs; each individual defendant also sentenced to 1 year in prison. Judgment affirmed on appeal (185 F 2d 3). Petition for certiorari denied by U. S. Supreme Court (340 U. S. 947).
(F. D. C. No. 21428. Sample Nos. 14616-H, 17656-H.)

INFORMATION FILED: January 20, 1947, Northern District of Illinois, against the Vrilium Products Co., a corporation, and George C. Erickson, president, and Robert T. Nelson, Jr., vice-president, of the corporation.

ALLEGED SHIPMENT: On or about June 25, 1945, from the State of Illinois into the State of Michigan.

PRODUCT: Examination showed that the device was not radioactive. The device consisted of a small glass tube sealed at both ends and containing a white crystalline substance. The glass tube was encased in a thin, pencil-shaped brass tube 1½ to 2 inches long.

NATURE OF CHARGE: Misbranding, Section 502 (a), certain statements in a leaflet entitled "General Directions," which accompanied the device, were false and misleading. The statements represented and suggested that the device would be effective in giving forth emanations having physiological value and that the device would be effective in the treatment of conditions involving the sinuses, bronchial tubes, thyroid, low red blood corpuscle count, injuries, burns, and illness in general. The device would not be effective for such purposes.

DISPOSITION: Following the entry of pleas of not guilty on April 12, 1948, counsel for the defendants filed motions to quash and to dismiss the information, which motions were denied. Trial of the case began before the court and a jury on March 20, 1950; and at its conclusion on April 5, 1950, the court gave the following instructions to the jury:

INSTRUCTIONS TO THE JURY

LABUY, District Judge: "Ladies and Gentlemen of the Jury, the Court will now instruct you as to the law which you are to apply in this case. I suggest you follow these instructions carefully because you will not have them with you in the jury room. So please pay close attention.

"This prosecution arises under the Federal Food, Drug, and Cosmetic Act. The purpose of the Act is to protect the public health and welfare. It is designed to require that purchasers be truthfully and accurately informed of what they are buying. Thus the law touches phases of lives and health of people that are largely beyond self-protection. This case was begun by an information in which the United States Attorney charged the defendants, Vrilium Products Company, a corporation, George C. Erickson, and Robert T. Nelson, Jr., individuals, with having made an interstate shipment of one carton containing a number of tubes known as 'Vrilium Catalytic Barium Chloride,' a device within the meaning of the Act. The device is alleged to have been misbranded by reason of statements made in the labeling of the device. It is alleged that statements in the labeling were false and misleading. The Government asserts that the defendants unlawfully caused to be introduced and delivered for introduction into interstate commerce a device which was misbranded. This the defendants deny. The Government asserts that accompanying the device when shipped in interstate commerce by defendants was a printed leaflet, which contained false and misleading statements. This the defendants also deny. The Government asserts that the device when shipped by the defendants in interstate commerce was misbranded in that the labeling was false and misleading because statements in the leaflet represented and suggested and created in the mind of the reader the impression that the device would be effective in giving forth emanations of a physiological value and that the device would be effective in the treatment of conditions involving the sinuses, bronchial tubes, thyroid, low red corpuscle count, injuries, burns, and illness in general; whereas, in fact and in truth, the device would not give forth emanations having physiological value or be effective in the treatment of the conditions already named. This the defendants also deny.

"There are two broad general questions involved in this case regarding which you will be required to concern yourselves. The first one pertains to the interstate commerce phase. In that regard the Government has charged the devices accompanied by a label and leaflets were shipped in interstate commerce from Chicago, Illinois, to Wyandotte, Michigan. You will have to decide whether the devices and labeling were so shipped. If you find that the devices and labeling were not shipped from Chicago to Wyandotte, Michigan, then it will be necessary for you to return a verdict of not guilty for all the defendants. If you decide the devices and labeling were shipped from Chicago to Michigan, for your second consideration, it will then be necessary for you to determine whether or not the labels and leaflets contained a false or misleading statement. If you decide that the devices and labeling were shipped from Chicago to Michigan, and that the label or leaflets contained a false or misleading statement, then there will be a third question for you to determine; that is, whether the Vrilium Corporation, Erickson or Nelson, or any or all of them, were responsible for the shipment. If you find that the

devices with labeling containing a false or misleading statement were shipped from Chicago to Michigan and that the defendants or any or all of them were responsible therefor, then you should return a verdict of guilty against the defendant or those defendants you find responsible.

"The intent with which the defendants, or any of them, acted is not a question for your consideration in this case. The Government is not required to prove a wrongful intent or an awareness of wrongdoing. It is not necessary for you to find that the Vrilium Products Co., George C. Erickson, Robert T. Nelson, Jr., or any of them, intended to make false or misleading statements in the labeling. The question of whether the defendants or any of them acted in good faith is not material. It is sufficient for a finding of guilt that the statements complained of, in the labeling or any one of them, be proven to be false or misleading, beyond a reasonable doubt, regardless of whether the defendants, or any of them, were aware that any one of the statements was false or misleading. The persuasive effect of a false or misleading statement in labeling, on the reader's mind, is the same whether the representations were made in good faith or not. It is the responsibility of the person or persons who use the channels of interstate commerce for the distribution of devices to be assured that the labels and the labeling of the devices contain no false or misleading statement or representation. The statute places the burden of acting, at their own risk, upon persons who ship devices; it does not place the risk of the use of devices upon the public, who are largely helpless in this regard.

"The Federal Food, Drug, and Cosmetic Act makes 'any person' who violates the section involved in this case guilty of a 'misdemeanor.' It specifically defines 'person' to include a 'corporation.' But the only way in which a corporation can act is through the individuals who act on its behalf. The commission of a 'misdemeanor' makes all those who shared responsibility in the business process resulting in an unlawful interstate shipment and who have such a responsible share in the furtherance of the transaction which the statute outlaws, namely, putting into the stream of interstate commerce misbranded devices, equally guilty.

"The fact that an information has been filed is not evidence; nor is the information evidence; and neither the information nor the return thereof should be considered by you in determining the guilt of the defendants, or any of them. The information is not to be treated by you as raising any kind of presumption or creating any kind of prejudice against these defendants, or any of them. The information is simply the form or manner prescribed by law for preferring a charge against an individual or corporation, and must be regarded in that light, and in no other light.

"This is a criminal case, and the law in such cases is that a defendant comes into court presumed to be innocent, and that presumption protects him until such time, if such time shall come, when the jury shall believe from the evidence in the case, beyond a reasonable doubt, that the defendant is guilty as charged in the information.

"The guilt of an accused is not to be inferred because the facts proven are consistent with his guilt, but, on the contrary, before there can be a verdict of guilty you must believe from all the evidence, and beyond a reasonable doubt, that the facts proven are inconsistent with innocence; if two conclusions can reasonably be drawn from the evidence, one of innocence and one of guilt, you should adopt the former.

"The defendants on trial have pleaded not guilty. This puts the burden of proving the charges in the information upon the Government, and you cannot find the defendants or any of them guilty unless, from all the evidence, you believe them or any of them guilty of the offenses charged in this information beyond a reasonable doubt.

"The Court instructs the jury in this case that the burden of proof never shifts to the defendants. They are presumed to be innocent and the burden of proof remains upon the Government throughout the case to prove that the claims or any one of them made by the defendants in their labeling are misleading and each is false.

"A reasonable doubt is what the term implies,—a doubt founded on reason. It does not mean every conceivable kind of doubt. It does not mean a doubt that may be purely imaginary or fanciful, or one that is merely captious or speculative; it means, simply, an honest doubt that appeals to reason and is

founded upon reason. If, after considering all the evidence in the case, you have such a doubt in your mind as would cause you, or any other reasonable prudent person, to pause or hesitate before acting in a grave transaction of your own life, then you have such a doubt as the law contemplates as a reasonable doubt.

"Two of the defendants have testified on the witness stand. You have heard their testimony. The fact that they are defendants does not mean that they cannot tell the truth. You should weigh the testimony of a defendant by the same rules that you weigh the testimony of any other witness. But you should keep in mind that they are defendants in the case, and, of course, have a vital interest in the outcome of the trial.

"The Federal Food, Drug, and Cosmetic Act defines 'labeling' to mean 'all labels and other written, printed, or graphic matter (1) upon any article or any of its containers or wrappers, or (2) accompanying such article.'

"You are instructed that the leaflets and carton labels, such as Government Exhibits 13E and D, involved in the shipment referred to in the information, constitute labeling within the meaning of the Act.

"The Federal Food, Drug, and Cosmetic Act provides that a device shall be deemed to be misbranded if its labeling is false or misleading in any particular.

"You are instructed that, as used in the Federal Food, Drug, and Cosmetic Act, the word 'false' applies to any representation or suggestion which is inaccurate, incorrect, untrue, or an erroneous statement of fact.

"You are instructed that the word 'misleading' as used in the Act applies to any written, printed, or graphic matter which misleads or deceives, or has a tendency to lead into error, to lead astray, or to lead into the wrong path. You are further instructed that deception may result from the use of statements not technically false or which may be literally true. The aim of the Act is as much to prevent deception which may result from indirection and ambiguity, as well as from statements or representations which are false. You are further instructed that it is not difficult to choose statements, representations, pictures, symbols, or slogans which will not deceive, and those which are ambiguous and liable to deceive should be read favorably to the accomplishment of the purpose of the Act, namely, the protection of the purchasing public and the public health. Statements that are ambiguous and liable to mislead, or which create or lead to false impressions in the mind of the reader, are misleading within the meaning of the law. In determining whether the labeling involved is false or misleading for any of the reasons claimed, you will consider whether the statements complained of are likely to create a false or misleading impression in the mind of any person who reads such statements pertaining to the claims made for the devices involved in this case.

"In determining whether any statement in the labeling, as previously explained to you, is false or misleading in any particular, and in determining whether any such statement represents or suggests that the article of device when used according to directions is effective in the cure, mitigation, treatment, or prevention of any condition, disease, or illness in general, you are instructed that the words, statements, or graphic material used in such labeling should be given their ordinary meaning, that is, the meaning that would be attributed to them by the ordinary person to whom they are addressed. If you believe beyond a reasonable doubt from the creditable evidence that an ordinary person after reading any of the statements complained of in said labeling would ordinarily be led to believe that a particular condition, or illness in general, would be cured, mitigated, or prevented by the recommended use of the device, or that the device when so used would be a competent treatment for such a disease, or condition or illness in general, and if you further believe beyond a reasonable doubt from the credible evidence that the device when used as directed would either not cure, mitigate, or prevent, nor be a competent treatment for such condition, disease, or illness in general, then the device is misbranded and shipments thereof in interstate commerce constitute violations of the Federal Food, Drug, and Cosmetic Act.

"The term 'device' is defined in the Federal Food, Drug, and Cosmetic Act and as it applies to the issues in this case 'means instruments, apparatus, and contrivances, intended (1) for use in the diagnosis, cure, mitigation, treatment,

or prevention of disease in man'; or '(2) to affect the structure or any function of the body of man.'

"You are instructed that the devices referred to in the information filed herein are 'devices' within the meaning of the Federal Food, Drug, and Cosmetic Act.

"You are instructed that under the Federal Food, Drug, and Cosmetic Act the causing of the introduction or delivery for introduction into interstate commerce of any device that is misbranded is unlawful.

"If you find that the labels or the leaflets of the devices involved in this information contain representations or suggestions that the devices when used as directed are effective in the cure, mitigation, treatment, or prevention of the diseases, disorders, conditions, or symptoms that are enumerated or for illness in general, or in affecting the structure or any function of the body of man, and, if you further find that the devices when employed in accordance with the directions for use will not be effective in the cure, mitigation, treatment, or prevention of any of the diseases, disorders, conditions, or symptoms enumerated or illness in general, or in affecting the structure or any function of the body of man, you will then find that the devices are misbranded.

"You are instructed that the devices here involved were misbranded if you are satisfied that the Government has proved beyond a reasonable doubt from the evidence that any single statement made in the labeling of the devices regarding the effect of the devices when used according to directions in the cure, mitigation, treatment, or prevention of any of the diseases, disorders, conditions or symptoms enumerated in the information, or illness in general, or in affecting the structure or any function of the body of man, was either false or misleading. In this regard it is not necessary for you to find that every statement complained of by the Government is false or misleading, but if the Government has sustained its contention in regard to any one of them, then it would be your duty to render a verdict in its favor.

"The Government is not required to prove that the devices involved are dangerous to health or harmful in any way. Whether the use of the devices would be harmless is not for your consideration. Any testimony tending to show that the devices when used according to directions may delay proper treatment, resulting in permanent injury or death to the user is over and above what the Government is actually required to prove in order for you to find that the contents of the labels or leaflets resulted in a misbranding of the devices. The Government is only required to prove the presence of one false or misleading statement in the labels or leaflets.

"The labels and labeling of the devices received in evidence indicate compliance with trade mark and copyright laws. The fact that there has been compliance with the laws involving trade marks and copyrights does not give the defendants, Vrillum Products Co., George C. Erickson, or Robert T. Nelson, Jr., or any of them, the right to disseminate any false or misleading statement on the labels or in the labeling of these devices. In reaching your verdict you will completely disregard all references on the labels and in the labeling to patents, trade marks and copyrights.

"You are the sole judges of the credibility and the weight which is to be given to the testimony of the witnesses who have taken the stand during this trial. You are the sole judges of the facts. You must, however, accept the law as given to you by the Court. In weighing the testimony of the various witnesses, you should take into consideration their interest, if any, in the outcome of the trial; their demeanor on the stand; their intelligence, training, experience, learning, and knowledge, or lack of any of them; their means and opportunities of seeing, knowing, and remembering the things testified to by them; whether they are corroborated or contradicted by other credible witnesses, and the facts in evidence; whether the things testified to by them are reasonable or unreasonable, and all other facts and circumstances in evidence. You may take into consideration their bias or prejudice, their interest, financial, or otherwise, which any witness may have in the outcome of the case, and weigh that testimony in accordance with all of the considerations which I have given you.

"Lay persons may properly testify to symptoms such as pains, aches, itching, stiffness or fatigue which they personally experience or conditions such as swelling, discoloration, cuts, abrasions of the skin, which they are able to see. They may testify to the taking of medication or other types of treatment taken

in connection with whatever they may be suffering from or afflicted with. They may properly testify to any alterations of those symptoms or conditions subsequent to resort to the medication or treatment. Any testimony or suggestions by such lay persons that improvement or aggravation of such symptoms or conditions was brought about by the use of any particular medication or treatment should be disregarded by you since such persons are not competent or qualified to determine the cause of benefit or improvement in physical condition.

"Certain testimony in this case has been objected to and sustained. Certain testimony has been stricken. You are to disregard testimony that has been stricken. You are also to disregard that testimony of any lay witness in which that person stated that he or she was suffering from any particular disease or that he or she was being treated for any particular disease. A lay person is not competent so to testify. Anything that a doctor told a lay person is hearsay. The doctor is the only qualified person to testify concerning the disease present and the reasons for the resort to treatment prescribed. Although a lay person is competent to testify to a change in recognizable symptoms, a doctor is the only qualified person to testify as to whether or not a cure has been effected, or any particular type of medication or treatment was effective in bringing about a cure or an alleviation of the ailment. The proneness of lay persons to err in accrediting responsibility for benefits to health is well understood. The nature of the simplest disease is so obscure to a layman that his conclusions touching what will benefit it and what will not benefit it mean little.

"Ordinarily in the trial of cases witnesses are confined in their testimony to facts within their personal knowledge. They are not permitted to draw conclusions or express opinions. There is an exception to that rule, however, which is this: That when the points in issue are concerned with a particular subject matter with respect to which there are trained persons who have had special education, training and experience in particular fields, such persons are known as 'experts' and because of their special education, training and experience are permitted to express opinions.

"You are required, of course, to weigh and evaluate the testimony of an expert witness precisely as you weigh and evaluate the testimony of any non-expert witness. That is, you will consider the probability and reasonableness of the things to which the 'expert' has testified, his interest in the outcome of the case, his education, training and experience, his standing in the profession, or lack of it, and the breadth of his experience in the subject matter which would enable him to arrive at a correct conclusion. In this regard you should ask yourself: Is this witness, as a matter of fact, an expert qualified by scientific education, training and experience to acquaint me with the scientific facts?

"Certain of the evidence in this case has consisted in the testimony of physicians and scientists, including chemists and nuclear physicists. Some physicians testified to their personal observations of the results or lack of results of the use of vrilium tubes on human patients. Physicists testified to the results they obtained in testing the tubes by means of scientific instruments. Chemists testified to their analyses of the powder-like material contained in the glass capsules. Facts established by recognized scientific investigations conducted by fair-minded, well-qualified scientific experts are deserving of considerable weight. You may attach greater weight to the testimony of such persons pertaining to scientific investigations than to the testimony of lay persons.

"If you believe from the evidence that any witness in this case has knowingly and wilfully testified falsely on this trial to any matter material to the issues in this case, you are at liberty to disregard the entire testimony of such witness, except in so far as it has been corroborated, if you find it has been corroborated, by other credible evidence, or by facts and circumstances proven on the trial.

"During a trial it often becomes the duty of counsel for the parties to object to questions, or to evidence, and I instruct you that you shall not take into consideration against such party either such objections or the number of them, nor permit yourselves to be in any way influenced by such objections against the parties.

"You should not allow sympathy for any of the defendants to this action or prejudice against any to influence your deliberations. You should not be influenced by anything other than the law, as I have explained it to you, and the evidence in the case. During the course of this trial articles have appeared in local newspapers pertaining to this trial, which you may or may not have read. You must completely disregard anything you may have read in newspapers or in any other type of publication about this case. You must also disregard anything you may have heard from persons other than witnesses who have appeared before you in this court room.

"I must instruct you that the question of the possible punishment of the defendants, or any of them, in the event of a conviction is not a matter for the jury to consider and should not, in any way, enter into your deliberations. The law imposes the duty of fixing a penalty solely upon the Court, who tries to perform it fairly and with due consideration for all the circumstances. The function of the jury is to weigh all the evidence and determine the guilt or innocence of the defendants, or any of them, solely from that evidence.

"You will be given a number of forms of verdict, and if your finding is the same as to all the defendants, you will use the same form, naming all of the defendants which expresses your vote.

"If your finding is not the same as to all of the defendants, then you will use the form naming the defendants individually which expresses your verdict as to each defendant.

"In signing the verdict the foreman signs the top line and the remaining jurors will sign the remaining lines. The women members of the jury or the lady members who are married will sign their own names, not your husband's. Your first duty upon retiring will be to elect a foreman before you proceed with your deliberations."

(Whereupon the jury retired to consider the verdict.)

A verdict finding the defendants guilty was returned by the jury on April 5, 1950. On April 26, 1950, after the denial of the defendants' motion for a new trial, the court imposed the fines and sentences as indicated in the court opinion set forth below. The case was appealed to the United States Court of Appeals for the Seventh Circuit; and on November 13, 1950, the following opinion was handed down by that court:

FINNEGAN, Circuit Judge: "Defendants-appellants seek to reverse a conviction, based upon the verdict of a jury finding them guilty of a violation of the Federal Food, Drug, and Cosmetic Act (21 U. S. C. A. 301-392).

"The information charging the offense was filed on January 20, 1947. It contained only one count. It charged that the defendants, on or about June 25, 1945, did unlawfully cause to be introduced and delivered for introduction into interstate commerce, for delivery to one Dr. R. C. Kistler, at Wyandotte, Michigan, one carton containing a number of tubes known as 'Vrilium Catalytic Barium Chloride,' a device within the meaning of 21 U. S. C. A. 321 (h), that said device when so caused to be introduced and delivered in interstate commerce was, then and there, misbranded within the meaning of U. S. C. A. 352 (a).

"On April 12, 1948, the defendants-appellants were arraigned and pleaded not guilty. At that time they were represented by counsel, and the case was set for trial on October 6, 1948. After several continuances, the case was set down for April 4, 1949. On March 25, 1949, the first attorney they had employed withdrew. On April 4, 1949, Justus Chancellor and his son Justus, Jr., were substituted as counsel for defendants-appellants.

"The defendants consented to the substitution. Mr. Chancellor, Sr., appeared on the motion to substitute. He then requested a continuance for sixty days, but this was denied and this case was re-set for April 11, 1949.

"On April 8, 1949, the elder Mr. Chancellor again appeared on behalf of the defendants and moved for additional time to prepare for trial. The court then set the matter for trial on April 18, 1949. Thereafter the case was continued from time to time. Some continuations were on motion of the Government, and others were made to suit the convenience of the court. The younger Mr. Chancellor never appeared in the trial court on behalf of the defendants-appellants, although motions to quash the complaint and dismiss the information were filed and argued by his father.

"Finally, and nearly a year later, on March 20, 1950, the case was called for trial. At that time Mr. Chancellor, Sr., requested a continuance because his son, who, he then said, was to try the case, had suffered a heart attack on the previous day and would be unable to proceed for two weeks. The father then claimed that because of his age he had not assumed the burden of a trial for several years. He also said that his hearing was not 'extra good.'

"The court denied the continuance and the trial began. The Government took five whole days to present its case. The defense consumed seven days in the presentation of its evidence. An additional day was expended in arguments and instructions to the jury, and to its deliberation to reach a verdict.

"On April 5, 1950, the jury returned its verdict finding the defendants guilty.

"On April 26, 1950, the defendants, accompanied by Mr. Chancellor, Sr., again appeared before the trial court. A motion for a new trial was filed and denied, and sentence was pronounced.

"The individual defendants, George C. Erickson and Robert T. Nelson, Jr., were sentenced to the custody of the Attorney General for one year and fined \$1,000 each; the corporate defendant, Vrilium Products Company, was fined \$1,000. On the same day, Mr. Chancellor, Sr., filed notice of appeal on behalf of defendants-appellants.

"At a later date, May 10, 1950, the attorneys who now appear in this court were substituted as attorneys for the appellants.

"It is here argued that the convictions should be reversed because:

1. The appellants were deprived of their Constitutional right to effective counsel of their own choice, which rendered the judgment of conviction against them a nullity;

2. The prosecution failed to prove that the defendants had shipped the devices in question in interstate commerce, and

3. That one instruction given was contrary to the evidence, usurped the function of the jury and constituted reversible error.

"The first contention involves an attack on the denial by the trial court of defendants' motion for continuance made on March 20, 1950.

"The ground upon which their request for delay was based was that Mr. Chancellor, Jr., had been stricken by a heart attack on the previous day. He was a member of the law firm, whose appearance had been filed on behalf of and with the consent of the defendants. Although he was one of their attorneys of record for more than eleven months, he never at any time appeared on their behalf. He did not even appear with his father and co-partner when the motion to quash the information and dismiss the case was argued. The father, although an elderly gentleman, had carried the entire burden up to that time; the son's name had never been even mentioned.

"Under such circumstances the law is plain—the rule to be applied was well expressed in *Isaacs v. United States*, 159 U. S. 487, a prosecution for murder in the Territory of Alaska, where it was said on page 489:

That the action of the trial court upon an application for a continuance is purely a matter of discretion, and not subject to review by this court, unless it be clearly shown that such discretion has been abused, is settled by too many authorities to be now open to question.

"The same rule was followed in *Hardy v. United States*, 186 U. S. 224. The reason for which continuance was requested in both those cases was the absence of material witnesses.

"In *Lias, et al., v. United States*, 51 F. 2d 215, in speaking of assignments of error, in a prosecution for conspiracy to violate the Prohibition Law, the court said on page 216, et seq.:

* * * the first of which is that the court erred in not granting a continuance or a change of venue, on the ground of the illness of the leading counsel for the defendant, who was the head of the firm representing them, and because of articles appearing in various newspapers dealing with the case and an alleged attempt to kill one of the prosecution's witnesses in the case.

The question of continuance was one addressed to the sound discretion of the trial court. This has been repeatedly held by this court, and it is scarcely necessary to cite authorities to that effect.

Here defendants were represented by two other members of the law firm, of which the leading member was ill; one of the attorneys representing appellants at the trial having been present before the commissioner. There was no good reason for continuance of the case upon ground of the illness of one of several attorneys, and the motion was properly denied. * * *

"On certiorari granted, the Supreme Court affirmed the Lias case in a per curiam opinion, 284 U. S. 584.

"In the case at bar, appellants were represented by counsel of their own choice. We have examined the record and can find no indication that their counsel was incompetent or negligent. The insinuations now made on behalf of appellants that he was 'ineffective' because of the loss of his sense of hearing, finds no justification in this record. In the face of the facts and circumstances shown by this record the first contention of the appellants must be over-ruled.

"The contention that the Government failed to show beyond a reasonable doubt that the devices and labels in question were shipped in interstate commerce is likewise untenable. The appellants themselves called many witnesses from neighboring states to show that they had used devices similar to those in question with beneficial results. Many of these witnesses actually dealt in such devices. On this record it might fairly be said that there is some conflict in the testimony that the devices were falsely labeled. There can be no question that the devices, or others like them, were introduced into interstate commerce. The shipment charged in the information was adequately proven by the testimony of the agent for the Railway Express Agency and its record, as well as consignee who appears to have been an agent for the defendant company engaged in part, at least, in selling their tubes.

"As far as the third contention is concerned, it is important to note that the appellants have taken from the instructions of the court to the jury, transcript of which covered more than fifteen pages, four lines, and sought to make it appear therefrom that the court intended to direct the jury that the leaflets and labels therein referred to had actually been shipped in interstate commerce. This is decidedly unfair and improper as will become evident when the whole charge is considered.

"At the outset of his instructions, the court said:

There are two broad general questions involved in the case with which you will be required to concern yourselves. The first pertains to the interstate commerce phase. In that regard the Government has charged the device accompanied by a label and leaflet were shipped in interstate commerce from Chicago to Wyandotte, Michigan. You will have to decide whether the device and labeling were so shipped. If you find that the device and labeling were not shipped from Chicago to Wyandotte then it will be necessary for you to return a verdict of not guilty for all the defendants. If you decide the device and labeling were shipped from Chicago to Michigan, for your second consideration it will then be necessary for you to determine whether or not the labels and leaflets contain a false and misleading statement.

"Our examination of the record convinces us that the jury was fully and fairly instructed by the trial court, and that its verdict finding the defendants guilty is amply supported by the evidence.

"The judgment of the District Court is affirmed."

On November 27, 1950, a petition for rehearing was filed by the defendants with the United States Court of Appeals for the Seventh Circuit, and was denied on December 15, 1950. The defendants thereupon filed a petition for certiorari with the United States Supreme Court, and this petition was denied on March 12, 1951.

3437. Misbranding of Hollywood Vita-Rol device. U. S. v. 125 Cartons * * *.
(F. D. C. No. 30382. Sample No. 24951-L.)

LIBEL FILED: January 15, 1951, Eastern District of Pennsylvania.